Supreme Court, U.S.
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No. 92-1954

In the
Supreme Court of the United States

October Term, 1993

COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,
ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI

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I. THE DECISION BELOW SUPPORTS AN UNPRECEDENTED AUTHORIZATION FOR AN AGENCY TO EMPLOY STATISTICAL METHODS THAT PRODUCE A SIGNIFICANT AND SYSTEMATIC BIAS

Massachusetts and amici demonstrated that this Court's precedents do not permit an administrative agency to adopt a statistical method that generates systematically penalties significantly in excess of statutorily-mandated amounts. Pet. pp. 28-34; Brief of Amici Curiae, pp. 17-19. Respondents seek to distinguish these authorities on the basis that they involved a different administrative agency's use of statistics to implement a program under a different statutory scheme. Brief for the Respondents in Opposition, p. 9 & n.5. In light of the fact that this is a case of first impression before the

Court with respect to the specific statutory provision and statistical method in issue, any precedent could be attacked on the grounds relied upon by Respondents.

Respondents would have this Court condone the establishment of a general principle of administrative law that an agency may adopt a statistical method that systematically generates penalties significantly in excess of statutorily-mandated amounts when the agency had non-biased alternatives that would be just as easy to administer. The manifest abuse inherent in such a principle raises important issues of federal law.

Respondents' argument that the Food and Nutrition Service ("FNS") was free to adopt the biased statistical method

hinges on its assertion that each alternative method "has competing advantages, disadvantages, and biases." Brief for the Respondents in Opposition, p. 8 n.4. Yet this linchpin of Respondents' argument is hidden in a footnote and supported by absolutely no citation to the record. Amici demonstrated that this assertion is directly contrary to the record;[1/] using a lower end of an appropriate statistical confidence interval instead of the midpoint of the confidence interval would have been just as easy to

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1/ It should be remembered that this case was disposed of on summary judgment. Consequently, even a dispute as to material fact would require reversal.

administer. Brief of Amici Curiae, p. 16. The only "disadvantage" associated with this alternative is that it would generate lower penalties. But as amici demonstrated, this argument then rests on circular reasoning and agency rewriting of the statute. Brief of Amici Curiae, pp. 16-17.

II. THE COURT OF APPEALS DEPARTED FROM THIS COURT'S PRECEDENTS IN ITS TREATMENT OF THE REPEAL ISSUE

The Commonwealth of Massachusetts devoted fully eleven pages of its Petition for Certiorari to demonstrating that the Court of Appeals formulated a construction of 1 U.S.C. § 109 that was at odds with this Court's precedents, Pet. 34-35; and this comprised the primary argument of the fifteen States filing as amici curiae, accounting for over half of their brief. Brief of Amici Curiae, pp. 2-13.

Respondents effectively concede that they have no response to this showing by addressing the issue in less than a page and a half buried at the back of their brief. Brief for the Respondents in Opposition, pp. 10-11. Respondents do not even cite any of the decisions of this Court -- or any judicial authority at all other than the decision below -- in this cursory discussion. Petitioner and amici demonstrated that the decisions of this Court uniformly reject the construction of "incurred" in 1 U.S.C. § 109 applied by the court below. See Pet. 39-43; Brief of Amici Curiae, pp. 9-11. The decision below expressly conflicts, inter alia, with this Court's decision in Hertz v. Woodman, 218 U.S. 205, 220, 221 (1910), as well as the numerous cases of this

Court that have applied 1 U.S.C. § 109 to save liabilities. See Brief of Amici Curiae, p. 9 & n.8. Respondents do not even attempt to reconcile the decision below with these decisions of this Court.

Instead of addressing the precedents regarding the uniform and long-held interpretation of 1 U.S.C. § 109, the Respondents merely repeat the error of the Court of Appeals: they fail to address the actual language of the statute, while seeking to construe it as creating a liability "incurred" prior to its repeal. Amici demonstrated that the Court of Appeals paraphrased 7 U.S.C. § 2025(g)(1) (Supp. 1981) in a fashion that actually reversed the operative words of the statute, thereby reaching the conclusion that liability was "incurred" before repeal when the actual

statutory language demonstrated that liability could not have been "incurred" until after repeal. Brief of Amici Curiae, p. 13. The whole system of automatic good cause review established by the FNS regulations supports the conclusion that no liability could have been "incurred" prior to the repeal. See Pet. 39-43; Brief of Amici Curiae, pp. 5-7. Respondents utterly fail to show how the Court of Appeals' paraphrase of the statute, which reversed the operative terms of the statute, could be sustained.

Having failed to address any of these points, Respondents assert that "the question of whether the 1982 amendments abrogated the Secretary's authority to impose sanctions for federal fiscal year 1982 has no

prospective importance, and there is no circuit conflict on that question." Brief for the Respondents in Opposition, pp. 10-11. But Respondents ignore the fact that 1 U.S.C. § 109 is a statute of general application and that the Court of Appeals' interpretation of it in this context will certainly serve as an important precedent is deciding in future cases whether liabilities under repealed statutes have been saved from abatement. This Court has previously found that 1 U.S.C. § 109 -- a statute of general application -- requires a consistent judicial interpretation, and that departures from that interpretation present an important question of federal law worthy of a grant of certiorari. See Brief of Amici Curiae, p. 2 n.3 (collecting authorities demonstrating

this Court's concern with maintaining a uniform construction of 1 U.S.C. § 109).

In sum, the decision of the Court of Appeals thus has significant "prospective importance," does serve to create a "circuit conflict on that question" (see Brief of Amici Curiae, p. 9 n.8), and directly conflicts with the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

By its attorneys,

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